UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

BEIERSDORF, INC. Employer and MR. ROBERT R. GASPERINO, An Individual Petitioner and UNITED STEELWORKERS OF AMERICA, LOCAL 15536, AFL-CIO, CLC Union	Case No. 34-RD-263

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

[1] The Union's unopposed request that the undersigned take administrative notice of the record in case No. 34-RD-224, is hereby granted.

4. The Employer, a Connecticut corporation with an office in Wilton, Connecticut and a plant in Norwalk, Connecticut, is engaged in the manufacture and non-retail sale of skin creams and lotions. While not entirely clear from the record, it appears that in 1966 the Union's predecessor was certified to represent a unit of production and maintenance employees employed by the Employer's predecessor. The unit as certified, and continuing to date, clearly excludes by its terms, "professional employees." It is currently consists of approximately 300 employees. For an undisclosed period of time pre-dating 1994 the unit has included production employees classified as "compounders" and excluded laboratory employees, classified as "bench chemists," who engage in quality control testing and product development.[2] In or about 1994 the Employer created the position of "mixed chemists" and agreed with the Union to include them in the unit.

Solely at issue in this proceeding are the 10 mixed chemists whom the Petitioner, with the Employer's concurrence, seeks to have "decertified" from the unit as professional employees within the meaning of Section 2(12) of the Act. The Union contends that the mixed chemists are not professional employees, and moves to dismiss the Petition. In 1997 the undersigned issued a Decision and Order in *Beiersdorf, Inc.,* 34-RC-224, (hereinafter cited as *Beiersdorf I*) dismissing a petition to hold an election to decertify the Employer's mixed chemists from the existing unit. (A copy of the relevant portions of that decision is attached hereto and incorporated herein.) Accept as noted herein, the record in the instant matter reveals no subsequent changes in the Employer's operations or in the qualification, duties or responsibilities of the mixed chemists. Since the issuance of *Beiersdorf I*, changes in the regulations of the U.S. Food and Drug Administration (FDA) have caused the Employer to be classified as a drug manufacturer, not just a cosmetics manufacturer. At the hearing the Employer asserted that "[s]ome of these new regulations have caused us to change our operations which, in fact, have led to some of the changes in this group [of mixed chemists]… ." However, except for the fact that the Employer is now required to engage in "good manufacturing practices" (GMPs), the only change reflected in the

[2] The record does not indicate the basis for the exclusion of the bench chemists. Presumably, they are considered by the parties to be "professional employees."

record is in the educational background of the mixed chemists. More specifically, as a result of the Employer's requirement that they possess a degree in chemistry, 8 of the 10 mixed chemists now have a Bachelor of Science degree. However, only 4 of those employees have a degree in chemistry or chemical engineering. The other 4 have degrees in biology. Of the remaining 2 employees, one holds a Bachelor of Arts and an MBA. The other has only 3 credits of "college level chemistry."

As I noted in *Beiersdorf I*, it is well established that the Board will not normally direct a decertification election in a unit that is not coextensive with the existing unit. *Utah Power & Light Company*, 258 NLRB 1059 (1981), and cases cited therein at footnotes 10 and 11. However, applying the policies inherent in Section 9(b)(1) of the Act, the Board may make an exception for professional employees who have never had the opportunity to vote in a self-determination election. *Utah Power & Light Company*, supra, at 1061; but cf*., Group Health Association, Inc.,* 318 NLRB 238 (1995). For the reasons noted below, I find that the mix chemists are not professional employees and that they are not entitled to such a vote.

More specifically, the fact that the group consists primarily of individuals with professional degrees, may now warrant a presumption "that the work they perform requires 'knowledge of an advanced type,'" *Avco Corp.,* 313 NLRB 1357 (1997). However, it remains clear that the work they perform does not meet the statutory requirements that it be predominantly intellectual and varied in character and involve the constant exercise of discretion and judgment. In this regard, I note particularly that their work continues to be governed by precise formulas and programs which they do not establish, and that they engage in no research and development nor perform any quality assurance tests. *Technicolor Graphic Services, Inc*., 253 NLRB 569, footnote 1, 572-573, (1980); cf., *The Firestone Tire & Rubber Company,* 181 NLRB 830 (1970).

Accordingly, I further find that no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and I shall grant the Union's motion and dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition herein be, and it hereby is, dismissed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 19, 2000.

Dated at Hartford, Connecticut this 5th day of July, 2000.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
Region 34
National Labor Relations Board

316-6733-0000
177-9325-0000